IMPROVING STATE-TRIBAL RELATIONS: 1989-1990 ACTIVITIES OF THE COMMITTEE ON INDIAN AFFAIRS

December 1990

Prepared by

Montana Legislative Council

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IMPROVING STATE-TRIBAL RELATIONS: 1989-1990 ACTIVITIES OF THE COMMITTEE ON INDIAN AFFAIRS

A Report to the 52nd Legislature
from the
Committee on Indian Affairs

Prepared by Connie F. Erickson, Staff Researcher

Montana Legislative Council
Room 138, State Capitol
Helena, MT 59620

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MEMBERSHIP:

COMMITTEE ON INDIAN AFFAIRS

Sen. Paul S. Svrcek,
Chairman

Sen. Delwyn Gage

Rep. Floyd Gervais,
Vice Chairman

Rep. Clyde B. Smith

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TABLE OF CONTENTS

CHAPTER NO. 630

(HB 54)

AN ACT CREATING A STATUTORY LEGISLATIVE COMMITTEE ON INDIAN AFFAIRS; APPROPRIATING FUNDS FOR THE COMMITTEE; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE.

WHEREAS, the 1987 Montana Legislature, through adoption of House Bill No. 20, provided for appointment of a four-member, equally bipartisan Committee on Indian Affairs; and

WHEREAS, House Bill No. 20 directed the Committee to perform a variety of tasks, including holding hearings to promote better understanding between the tribes and the public agencies, acting as a liaison between the Indian people and the Legislature, promoting amicable Indian/non-Indian relations, and encouraging participation of Indian people at its meetings; and

WHEREAS, the Legislature appropriated $4,500 to the Committee to fulfill the mandates of its enabling legislation; and

WHEREAS, within this limited budget, the Committee held four meetings and addressed such topics as cross-deputization agreements and Indian students in postsecondary education; and

WHEREAS, these meetings were well attended by both tribal representatives and state agency personnel; and

WHEREAS, these meetings provided a forum for both Indian and non-Indian people to discuss their concerns before a legislative body; and

WHEREAS, the Committee succeeded in developing good rapport with many tribal representatives; and

WHEREAS, the Indian people in Montana have indicated support for appointment of a legislative committee to continue the work of the 1987-88 Committee on Indian Affairs; and

WHEREAS, it is in the interest of all Montanans that Indian/non-Indian communications and relations be enhanced; and

WHEREAS, appointment of a statutory legislative committee on Indian affairs would enhance Indian/non-Indian communications, relations, and cooperation.

Be it enacted by the Legislature of the State of Montana:

Section 1. **Definition.** As used in [sections 1 through 9], "committee" means the committee on Indian affairs created in [section 2].

Section 2. **Committee on Indian affairs -- appointment and composition.** (1) There is a committee on Indian affairs.

(2) The committee consists of two members of the senate, appointed by the committee on committees on a bipartisan basis, and two members of the house of representatives, appointed by the speaker of the house on a bipartisan basis.

(3) Appointments must be made before final adjournment of a regular session.

Section 3. **Term of office.** Appointments to the committee are for 2 years. A member of the committee serves until his term of office as a legislator is ended or his successor is appointed, whichever occurs first.

Section 4. **Vacancies.** (1) A vacancy occurring during a legislative session must be filled in the same manner as the original appointment.

(2) A vacancy occurring when the legislature is not in session must be filled by the selection of a member from the appropriate house and political party by the remaining members of the committee.

(3) An appointment to the committee under this section is for the unexpired term of the original member.

Section 5. **Officers.** The committee shall select one of its members as chairman and may elect other officers it considers necessary.

Section 6. **Meetings and compensation.** (1) The committee shall meet as often as the chairman considers necessary during and between legislative sessions.

(2) Committee members are entitled to receive compensation and expenses as provided in 5-2-302.

Section 7. **Staff assistance.** The legislative council shall provide staff assistance to the committee. The legislative council has the same authority of investigation and examination and the same authority to hold hearings on behalf of the committee as it has for other committees under 5-11-106 and 5-11-107.

Section 8. **Duties of the committee.** The committee shall:

(1) seek opinions of and information from Indian tribes, Indian tribal organizations, state agencies, local governments, non-Indians living on or near Indian reservations, and other interested persons and agencies in order to gain insight into Indian/non-Indian relations;

(2) hold hearings both on and off reservations to promote better understanding between tribes and public agencies and to improve both the Indian people's knowledge of the structure of state agencies and the legislative process and the non-Indian people's knowledge of tribal government and institutions;

(3) encourage and foster participation of Indian people at its meetings;

(4) act as a liaison between the Indian people and the legislature;

(5) encourage tribal-state and tribal-local government cooperation and otherwise promote amicable Indian/non-Indian relations;

(6) cooperate with the commissioner of higher education in a study of Indian students in Montana schools; and

(7) report its activities, findings, recommendations, and any proposed legislation to the legislature.

Section 9. **Appropriation.** There is appropriated for the biennium ending June 30, 1991, $6,000 from the general fund to the legislative council for use by the committee on Indian affairs.

Section 10. **Effective date.** [This act] is effective on passage and approval.

Approved April 25, 1989.

RECOMMENDATIONS

The Committee on Indian Affairs respectfully presents to the 52nd Legislature and recommends for passage:

LC 147 (Appendix D) - to appropriate money to the Commissioner of Higher Education for an Office of American Indian/Minority Achievement; and

LC 148 (Appendix E) - to amend the nepotism law to allow school districts to hire qualified personnel who are related to the school trustees.

INTRODUCTION

At the request of the 1987-88 Committee on Indian Affairs, Representative Marian Hanson introduced House Bill No. 54 (Chapter 630, Laws of 1989) to create a legislative committee on Indian affairs. The legislation called for the appointment of two senators and two representatives, with both political parties represented from each house. The legislation also outlined methods for filling vacancies, electing officers, and compensating members. As with previous Indian affairs committees, this one would terminate in two years.

The bill was introduced on January 2, 1989, and referred to the State Administration Committee. During the Committee hearing, it was noted that the Indian affairs committee had been in existence since 1979. Perhaps the time had come to create a statutory committee. The bill was amended to reflect this and was subsequently signed by Governor Stephens on April 25, 1989.

The legislation appropriated $6,000 for the operation of the Committee on Indian Affairs, with staff assistance from the Legislative Council. The duties of the Committee were also outlined in the legislation:

(1) seek opinions of and information from Indian tribes, Indian tribal organizations, state agencies, local governments, non-Indians living on or near Indian reservations, and other interested persons and agencies in order to gain insight into Indian/non-Indian relations;

(2) hold hearings both on and off reservations to promote better understanding between tribes and public agencies and to improve both the Indian people's knowledge of the structure of state agencies and the legislative process and the non-Indian people's knowledge of tribal government and institutions;

(3) encourage and foster participation of Indian people at its meetings;

(4) act as a liaison between the Indian people and the Legislature;
(5) encourage tribal-state and tribal-local government cooperation and otherwise promote amicable Indian/non-Indian relations;
(6) cooperate with the Commissioner of Higher Education in a study of Indian students in Montana schools; and
(7) report its activities, findings, recommendations, and any proposed legislation to the Legislature.

Senator Delwyn Gage, Senator Paul Svrcek, Representative Floyd Gervais, and Representative Clyde Smith were appointed as members of the Committee. In November 1989, Senator Svrcek was elected chairman and Representative Gervais was elected vice chairman.

The Committee surveyed various state agencies, tribes, and tribal organizations to solicit ideas for interim study topics. As a result, the following topics were selected for study:

(1) taxation;
(2) protection of ancient burial remains;
(3) gambling;
(4) urban Indians; and
(5) Indian students in higher education.

Due to a lack of time, the issue of gambling on the reservations was not addressed by the Committee. The topic of Indian students in higher education was expanded to Indian education in general.

This report summarizes the activities of the Committee on Indian Affairs during the 1989-90 interim. Additional information on the Committee's work, including meeting minutes, staff reports, and correspondence, is available through the Montana Legislative Council, Research Division, State Capitol, Helena, Montana 59620.

Many individuals and organizations assisted the Committee in its work during the 1989-90 interim. The Committee extends its appreciation to all those who attended and participated in its meetings. In particular, the Committee wishes to thank the Office of the Coordinator of Indian Affairs, the Commissioner of Higher Education, the Montana Advisory Council for Indian Education, the Montana Indian Education Association, the Superintendent of Public Instruction, the Montana Department of Revenue, the Reserved Water Rights Compact Commission, and the Department of Family Services for their assistance.

TAXATION ON MONTANA INDIAN RESERVATIONS

Background

Taxation has become one of the most controversial issues in Indian affairs. As tribes begin to take advantage of economic development programs and as reservations' reserves of natural resources become more valuable, there is more impetus on Indian reservations to levy taxes. The federal government appears anxious for tribes to assume a greater share of the administrative responsibility and cost of reservation services. At the same time, state and local revenue systems are under increasing strain. The net effect of reservation economic development, of growing demands for state, local, and tribal services, and of the increasing difficulty in raising local revenue is intensified competition for the reservation tax base and the "ever-shrinking dollar".

Tribal sovereign authority, as noted frequently by the United States Supreme Court, is subject to the "plenary" authority of Congress. The sovereign powers of a federally recognized tribe remain intact unless Congress explicitly and intentionally abrogates them. One of the powers essential to the maintenance of any government is the power to levy taxes. Tribes retain this power as an inherent attribute of tribal sovereignty that continues unless withdrawn or limited by treaty or by an act of Congress. The power to levy taxes does not spring from the sovereign power of the United States but is derived from the inherent sovereignty of Indian tribes that predates the United States itself. As a result, the same taxes that the federal and state governments can impose on its citizens may be imposed by a tribe on its citizens.

Within Indian country, and particularly where Indian interests are affected, the powers of a state to tax are severely limited. The general rule is that in the absence of Congressional authorization, the state may not tax receipts from Indian trust property. However, as a result of some United States Supreme Court decisions, the court has developed two independent, yet related, tests to determine which state laws may be enforced in Indian

country: the federal preemption test and the infringement test.[1] The federal preemption test simply states that a state law that violates a federal law fails the preemption test. In addition, any state law that interferes with the inherent right of Indian tribes to be self-governing fails the infringement test.

In Montana, the Department of Revenue adheres to the policy that state taxes are imposed on all persons residing or conducting business on Montana Indian reservations unless federal or state law or a court ruling prohibits imposition of a particular tax. Among those persons residing or conducting business on a reservation, non-Indians and Indians who are not members of the tribe that governs the reservation (i.e., nonmember Indians) are treated alike for state tax purposes. Both groups are subject to most state taxes. In contrast, Indians who are members of the tribe that governs the reservation (i.e., tribal members) are subject to some state taxes and exempt from others. In addition, most state taxes are not imposed on tribal governments.

The Department currently administers approximately 30 taxes on the reservations. It does not impose taxes in the following areas: (1) income earned by tribal members on the reservation; (2) mineral royalties, including the severance tax and gross proceeds tax on the ceded strip;* and (3) sales of cigarettes to smoke shops. Personal property taxes are not collected from tribal members who reside on the reservation at least 50% of the time.

Although an Indian tribe has the authority to levy taxes on its citizens, many tribes have been reluctant to do so because of traditional Indian hostility to taxation and the extensive poverty that exists on many Indian reservations.[2]

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* The ceded strip is a strip of land north of the Crow Reservation that was ceded by the Crow Tribe to the United States in 1904. The United States ultimately sold most of the property. In 1958, the Crow Tribe accepted ownership of the portion that had remained unsold. In 1985, in a case brought by the tribe, the United States District Court upheld the application of Montana taxes on coal extracted from the ceded strip. The decision was reversed by the Ninth Circuit Court of Appeals, with that decision affirmed by the United States Supreme Court.

However, because of dwindling natural resources and decreasing federal support, many tribes are turning to taxation as a source of revenue to fund tribal operations and services.

In Montana, there are currently four Indian tribal governments levying taxes on their respective reservations: Blackfeet, Fort Peck, Fort Belknap, and Crow. The Flathead and Rocky Boy Tribes charge fees for business and recreation licenses; both tribes are also considering the implementation of some taxes on their reservations. The Northern Cheyenne Tribe is reluctant to levy taxes on its people because of the 70% unemployment rate on the reservation and the lack of a tax base. However, the tribe recognizes the necessity for taxes to maintain the tribe.[3]

The most common taxes levied on Indian reservations are those on natural resources. Taxes on cigarettes and utilities and a possessory interest tax are also levied by different tribes.

Committee Activities

On February 15, 1990, the Committee on Indian Affairs held a meeting entirely devoted to the topic of state and tribal taxation. Professor Margery Brown of the University of Montana School of Law presented an analysis of state and tribal taxation powers. This was followed by a presentation by staff members of the Department of Revenue on state taxation on Montana Indian reservations.

One of the more controversial tax issues facing the Department is the taxation of cigarettes sold on a reservation to non-Indians or nontribal members. The Department has the authority to tax these smoke shop sales but is reluctant to do so because of the controversial nature of the issue and the lack of legislative support to take on the additional administrative burden that collecting the tax would entail.

In response to a request from Committee staff, the Department reported that it is unable to estimate how much revenue is collected from tribal members or others living on-reservation. However, it has been determined that Indians residing on the Blackfeet Reservation receive $2 in state and local services for each $1 of tax revenue collected on the reservation. Most of the revenue collected on oil and gas production goes to fund on-reservation schools.

The Department also reported on current litigation in which it is involved, the most significant of which is the Crow case involving Montana's coal severance tax. Other cases involve the resource indemnity trust tax, the taxation of fee land owned by tribal members, and the state tax on gasoline used in vehicles driven only on the reservation. The Department prefers to settle these disputes by means other than litigation and therefore continues to explore other options.

Tribal representatives also addressed the Committee on taxation issues. Tribal governments face the same problems as the state and counties: increasing costs and stagnant or shrinking revenue. As a consequence, tribal governments have cut costs and raised taxes. The Blackfeet, for example, have recently doubled their severance, privilege, and resource indemnity trust tax rates.[4]

Tribal representatives cautioned the Committee that a court decision in one state cannot be unilaterally applied to a similar situation in another state. Court decisions are site-specific and fact-specific. For that reason, negotiation is preferable to litigation. Water issues are being solved through dialogue and negotiation; taxation issues can be solved that way as well. The tribal representatives advocated the use of tax coordination agreements.

Both the state and the tribes expressed concern over the recent decision in Cotton Petroleum Corporation v. New Mexico, No. 87-1327 (U.S. Sup. Ct., April 25, 1989), that allows non-Indians doing business on Indian land to be

taxed by both the tribes and the states. This "double taxation" is making it uneconomical for industry to develop resources on Indian land, thus depriving both the tribes and the states of the benefits of this development.

Senator Gage reported on a meeting* he attended in Billings that was called by the Fort Peck Tribes to discuss taxation issues, especially the Cotton Petroleum decision. Some of the solutions proposed at the meeting included: (1) tax coordination agreements; (2) tax credits to industries doing business on reservations; and (3) federal block grants to tribes in lieu of assessing taxes. Attendees at the Billings meeting appointed an ad hoc committee to pursue these proposals further.

After testimony from other interested persons, the Committee agreed to monitor the progress of the Billings ad hoc committee and to not pursue separate legislation addressing state/tribal taxation issues at this time.

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* The meeting was sponsored by the Fort Peck Tribes in Billings on January 18 and 19, 1990. Representatives from all the Montana tribes, the Department of Revenue, oil companies, Montana's congressional delegation, and the Committee on Indian Affairs attended. The meeting was called to address the effects of the Cotton Petroleum decision. Under Cotton Petroleum, the court held that the State of New Mexico and the Jicarilla Apache Tribe both have equal authority to tax resources on trust lands, resulting in a system of dual taxation.

PROTECTION OF ANCIENT BURIAL REMAINS

Background

The issue of the protection of ancient burial sites and human remains was brought to the Committee on Indian Affairs in November 1988 by representatives of the Confederated Salish and Kootenai, Blackfeet, and Northern Cheyenne Tribes. Their concern was that the state "lacks a coherent State policy regarding the protection of ancient human remains which are discovered within the State and which may be subject to disturbance by the activities of State agencies".[5] The tribes believed that legislation could be designed to address the concerns of both themselves and the scientific and historic communities. The Committee agreed to draft and sponsor this legislation.

Senate Bill No. 434 was introduced by Senator Gage at the request of the Committee on Indian Affairs. Called the "Cemetery Burial Sites and Human Remains Protection Act", the bill established reporting and notification procedures regarding the disturbance of a burial site. The bill also set up procedures for the disinterment, curation, repatriation, and reinterment of human remains. The bill died in committee when other interested parties expressed concerns. However, it was generally agreed that there was a need for this type of legislation and that in all likelihood, a bill could be drafted that was agreeable to all parties concerned. Furthermore, all of the affected entities expressed a willingness to work with the Committee on Indian Affairs on this legislation during the 1989-90 interim.

Committee Activities

At its first meeting in September of 1989, the Committee chose to continue its work on legislation relating to the protection of burial sites. In addition to the various tribal cultural committees, other groups had asked to be included in the discussions regarding this topic. The other groups included

archaeologists, coroners, the Highway Department, and the State Historic Preservation Office. Eddye McClure, staff attorney from the Montana Legislative Council, was requested to work with the various interest groups and state agencies in drafting the legislation.

State Archaeologist Dave Schwab appeared before the Committee in February 1990 to report on the progress of the legislation. He presented a flow chart outlining the process for handling burial sites and human remains when they are encountered. He felt the flow chart would be the simplest way to present the proposed legislation rather than the bill language itself. The legislation would pertain to all land surfaces, both public and private, unless superseded by federal laws or regulations. The legislation would apply to all skeletal remains encountered after the law's implementation. The legislation would provide for criminal penalties for the wanton destruction and robbing of burial sites. Consideration is also being given to the levying of civil penalties against public officials who fail to follow the procedures outlined in the bill. Mr. Schwab suggested some other areas that should be addressed in the legislation:

(1) definitions of "antiquity" and "vandalism";
(2) time frames for assessments and decisionmaking;
(3) framework for discussions and dispute resolution;
(4) procedure for determining ethnic affiliation and antiquity; and
(5) procedure for addressing partially disturbed and unthreatened burials.[6]

In response to a question on law enforcement involvement from the Committee, Mr. Schwab said he planned to contact law enforcement officials for their perspective on this legislation. The Committee asked Ms. McClure to continue to work with the various groups on this issue.

At the final meeting of the Committee on October 11, Ms. McClure reported that the burial protection bill was drafted. Tribal representatives, state

agencies, and other interested groups had reviewed the draft and generally agreed on the burial protection part of the bill. However, there was a difference of opinion on the repatriation* section. The federal government is considering legislation in this area, and some groups questioned the need for a repatriation section in this bill. Also, because this bill would cover all burial sites, not just Indian sites, some groups did not want it presented as an Indian issue and therefore preferred that the Committee on Indian Affairs not sponsor the bill. At the time of the writing of this report, the issues of repatriation and Committee sponsorship had not been resolved.

* Repatriation means the return of human skeletal remains or burial material that can be identified by a particular tribal group, next of kin, or descendants and that is presently in the possession of state institutions, political subdivisions, or entities.

INDIAN EDUCATION

Background

Indians traditionally instructed their children through the use of such techniques as storytelling, listening, and remembering. Although less formal than what is usually thought of as education, this instruction served the Indians well because it provided them with the knowledge and skills necessary to survive in their environment. When the Europeans arrived on this continent in the 15th century, they brought with them their notions of what constituted an education. Those notions were far different from the Indian notion. The Europeans failed to recognize this traditional educational format of the Indians and imposed a European-style education, thus disrupting the Indian education system that had served its adherents so well.

The first schools in Indian country were conducted by Christian missionaries. The schools were mainly boarding facilities where Indian children could be kept from tribal influences. Assimilation was the goal of these schools. By the end of the 19th century, however, the federal government had become the dominant educational agency for the American Indian. The government kept the boarding school concept of the missionaries but conducted day schools as well. Assimilation remained the primary educational goal.

In 1928, the Meriam Report was published that was severely critical of the federal government's treatment of the Indians.[7] The report stated that the purpose of Indian education should be to assist Indian children to function in both the white and Indian worlds. The report recommended changes in the curriculum of the Indian schools and also attacked the boarding school system for elementary aged students. The report spurred two subsequent Commissioners of Indian Affairs to attempt to implement reforms. However, the Great Depression and opposition from within the Bureau of Indian Affairs (BIA) made change difficult.

In the 1930s and 1940s, the federal government began dismantling its Indian school system. The Indian Reorganization Act laid the groundwork for autonomous tribal government.[8] The Johnson-O'Malley Act provided funds for the education of Indian children in public schools.[9] By the 1950s, only a handful of government boarding schools remained; the education of Indian children became largely a function of the public schools.

By the 1970s, Indian leadership, more politically active than ever before because of increasing involvement in resource development, realized that it would have to take control in order to effect changes in the Indian educational system. Four concepts guided this new educational self-determination:

(1) Indians must be significantly involved in their schools and given a measure of control.
(2) English must be taught as a second language.
(3) The schools must assist in community development.
(4) The schools should help transmit the culture of the parents to the children.[10]

The U.S. Congress aided this new educational self-determination by passage of the Indian Education Act in 1972.[11] This legislation provided funds: (1) to public schools for Indian students; (2) to states, school districts, colleges, and tribes for special programs and projects, including individual fellowships; (3) for adult education programs in Indian communities; and (4) to create the Office of Indian Education within the BIA.[12] Congress also passed the Tribally Controlled Community College Assistance Act of 1978 to provide direct federal funding on a per-student basis to tribally controlled colleges.[13] Its passage was followed by an increase in the number of tribally controlled colleges and by substantial growth in the academic standing of these colleges.

As was true nationally, the 1970s in Montana saw a tremendous amount of

activity related to Indian education. In 1972, the framers of the new constitution recognized the unique role of Indians in Montana's history and committed the state to fostering that unique contribution. This commitment is contained in the constitutional article on education. Article X, section 1, subsection (2), of the Montana Constitution reads:

> The state recognizes the distinct and unique cultural heritage of the American Indians and is committed in its educational goals to the preservation of their cultural integrity.

Following the adoption of the new constitution, the Montana Legislature began taking steps to implement this commitment. In 1973, the Legislature passed the Indian Studies Act that required school districts on or near reservations and with a significant Indian enrollment to employ only certified personnel who had completed training in American Indian studies.[14] The purpose of the legislation was twofold: to recognize and support the unique heritage of Indian people and to make that heritage accessible to non-Indians.[15] In that same legislative session, House Bill No. 578 was passed that created the Montana Commission on Postsecondary Education.[16] The Commission was to make a detailed study of postsecondary education and institutions in Montana. The study resulted in a final report that contained over 100 recommendations, 21 of which specifically pertained to Indians.

The 1974 Legislature approved the passage of House Joint Resolution No. 60 that directed the Board of Public Education and the Board of Regents to develop a master plan for enriching the background of all public school teachers in American Indian culture.[17] The purpose was to expand the provisions of the Indian Studies Act to all public school teachers. Although it did not have the force of law, the resolution clearly specified the intent of the Legislature concerning the role of Indian culture in Montana education. The final report was adopted by the State Board of Education in May 1975 as the "Indian Culture Master Plan".[18]

By 1977, however, the tide had turned. Every major piece of legislation

introduced during the 45th Legislative Session and related to Indian education was defeated, including an attempt to extend the teacher training program passed the previous session. Two years later, the Legislature amended the Indian studies law to make it permissive rather than mandatory and gave sole responsibility for the program to the local board of school trustees. Since that time, there has been no legislation passed or even introduced that directly related to Indian education.

In 1988, the Office of the Commissioner of Higher Education submitted a proposal to the State Higher Education Executive Officers for a grant to study the problems of under-representation and under-achievement of Indians in higher education. The goals of the proposal were to:

(1) design a data base and tracking system to report and monitor Indian participation and performance at every educational level;

(2) develop specific statewide goals with implementation activities and time lines to increase participation and performance of Indian students; and

(3) develop a request to the Legislature for specific financial support necessary to increase Indian participation in the educational process.[19]

The proposal was funded and became the Montana Tracks Project. The Tracks Project has produced the following results: adoption of a definition of American Indian; better data collection efforts to provide more accurate information on American Indians; systematic analysis of racial/ethnic data to chart changes and implications for curriculum and program needs; and creation of an Office of American Indian/Minority Achievement to coordinate efforts among higher education, the K-12 system, and American Indians.[20]

There is a new urgency in Indian country to improve educational opportunities for Indian children. Education is viewed as the antidote to the

poverty, high unemployment, and substance abuse problems that exist on Montana's reservations. Indian educators are hoping to make the 1990s the decade of Indian educational achievement.

Committee Activities

On April 19, 1990, the Committee on Indian Affairs held a meeting devoted to the topic of Indian education. Speakers representing K-12 and postsecondary education addressed the Committee on issues facing Indian education in Montana today.

The speakers identified some of the problems that Indian students encounter in Montana's public schools. Reportedly, in non-Indian and partially integrated schools, there is often a lack of sensitivity in grades K-12 to the needs of Indian students. Indian culture is rarely addressed in the schools. Indian teachers who can serve as role models are lacking. Oftentimes school districts that are predominantly Indian have all non-Indian trustees. Indian students who come to school speaking their native language are often inappropriately placed into special education classes when bilingual classes are what they need. There has been a lack of support for Indian education from the state educational agencies. At the postsecondary level, Indian students face difficulties in securing necessary financial aid. Some educational loans are available from the BIA, but competition is fierce. Financial aid programs expect students to pay a portion of their education expenses; however, with the high rate of unemployment on the reservations, it is difficult for the students to assume an education debt. Indians are poorly represented in administrative and faculty positions. Racism continues to be a problem throughout the entire educational system.

Preliminary data from the Tracks Project indicates that American Indians constitute roughly 10% of the total student enrollment in Montana's K-12 public schools. This is a significant segment of the school-age population, and it is a great waste of human potential to ignore these students' needs.

There were a number of specific recommendations offered by the speakers to address the identified problems. It was hoped that the Committee would consider legislation to implement some of the recommendations. The recommendations included:

(1) incorporation of materials relating to Indian culture into the curriculum of the University System and public schools;
(2) revision of nepotism laws;
(3) appointment of an American Indian to the Board of Regents;
(4) development of an affirmative action plan for schools with predominantly Indian student enrollments;
(5) designation of one pupil-instruction-related (PIR) day for Indian cultural awareness;
(6) state funding for an Office of Indian Education in the Office of Public Instruction and an Office of American Indian/Minority Achievement in the Commissioner of Higher Education's office;
(7) state assistance for non-Indian students attending tribal colleges;
(8) review of the Indian Culture Master Plan developed in 1975;
(9) creation of a task force on Indian education, composed of legislators and Indian educators;
(10) alternative certification for Indian language and culture teachers; and
(11) requirement of Indian studies for prospective teachers.

The Committee agreed to consider legislation relating to nepotism, one PIR day for cultural awareness, funding for an Office of American Indian/Minority Achievement, and the appointment of an American Indian to the Board of Regents.

INDIANS IN URBAN MONTANA

Background

Urban Indians are an almost forgotten segment of the American Indian population. Urban Indians account for over 50% of the total Indian population in the United States. Urban Indian populations were created after World War II when the federal government embarked on a policy of termination of federal recognition and services for Indian tribes so that Indians would leave the reservations and relocate in the cities. This policy resulted in worsening economic conditions and skyrocketing unemployment rates on reservations. In order to combat this disastrous turn of events, the federal government organized a relocation program that moved a quarter of a million unemployed Indians from reservations to urban centers, with promises of a better life. However, the better life never materialized. The same problems that existed on the reservation, namely, disorientation in white society, poor health, inadequate housing, and limited opportunities for employment, were found in the urban setting and compounded by the absence of federal support. Contrary to government intentions, urban Indians retained their cultural identity, but because of the lack of the tribal community support network and the extended family available on the reservation, they suffered in cultural isolation.

Today, only 58% of the urban Indian adult population is employed. Indian people in urban settings are still in poor health, are experiencing high mortality rates, alcoholism, substance abuse, acts of violence, and accidents, and are at an increased risk for AIDS infection. They face a myriad of problems in adjusting to the urban environment. These problems include: differing cultural values, language difficulties, few economic resources, and inappropriate skills. In addition, they may be less adept at understanding the job-seeking process than the typical urban dweller.[21]

Urban Indians are an invisible minority. The federal trust responsibility has

been interpreted to exclude off-reservation Indians; many state governments believe that urban Indians receive adequate resources from the federal government. Urban Indians who are enrolled members of federally recognized tribes often do not receive tribal services because tribal governments focus primarily on those residing on the reservations and because of a lack of funds. Urban Indians lack political power because they do not vote as a bloc; neither do they have a lobby to guide favorable legislation.

Urban Indians are a unique group of people in that they are caught in a strange land with strange values. They fight to retain their Indian identity in the midst of a dominant culture that does not understand them and, in many ways, disparages their heritage. They suffer from the same social ills as their reservation counterparts but without the tribal/familial network that provides solace and support.

In its long history, the Committee on Indian Affairs has never addressed the issue of urban Indians. The Committee's focus has mainly been on reservation issues and the state-tribal relationship. This interim the Committee chose as a study topic Indians in urban Montana.

Committee Activities

On September 13, 1990, the Committee held its fourth meeting devoted to the topic of Indians in urban Montana. Speakers in the areas of health care, education, employment, and discrimination addressed the Committee regarding their concerns and some possible solutions.

Health Care: The major health problems facing off-reservation Indians are substance abuse, mental illness, accidents, and acts of violence. Because of the high rate of substance abuse, Indian people are at a high risk for AIDS. The overwhelming majority of Indian people diagnosed with AIDS come from urban areas.

Funding for urban Indian health clinics comes from the Indian Health Service (IHS) budget. Although 54% of all Indians in the United States live off-reservation, less than 1% of the IHS budget goes to urban health programs. As a result, the urban programs can offer only a bare minimum of services, such as immunizations, birth control, prescription refills, and basic care. Laboratory services are very limited; x-ray services are generally not available. Indians with more severe health problems are referred to the nearest IHS program, often many miles away, or to another medical facility if they have other health care benefits.

Education: Many of the problems faced by Indian students in urban school districts are the same as those faced by Indians who attend public schools on or near reservations. These problems include too few Indian teachers and administrators, a lack of sensitivity towards Indians by teachers and administrators, and no recognition of Indian culture in the curriculum. Moreover, there are some problems unique to the urban situation. Many of the Indian students in Montana's urban areas are members of the Little Shell Band that is not recognized by the federal government and therefore is ineligible for federal funding. Federal programs that target Indian students are often directed towards school districts on or adjacent to Indian reservations. Urban Indian students who are enrolled tribal members receive few, if any, of the benefits received by reservation students. Urban Indian students seeking tribal assistance with college expenses are often passed over in favor of reservation students. Bilingual programs exist in districts on or near reservations, but none exist in urban districts with large numbers of Indian students.[22]

Employment: One of the biggest problems facing Indians who leave the reservation to settle in Montana's cities and towns is lack of employment. Most Indians move off the reservations because they believe employment opportunities are greater in Montana's small cities and towns. It is important to note that when they arrive in these cities and towns, they are most often unemployed. Many of these Indians are able to find only temporary

employment and move to and from the reservation as work is available. Strong familial and cultural ties also impact this movement between reservation and town. The unemployment rate for off-reservation Indians can vary from 20% to 50%, depending upon the time of year. While this rate is comparable to the unemployment rate on the reservations, which varies from 40% to almost 80%, it is much higher than the overall Montana unemployment rate, which currently stands at 5.6%.[23]

In order to assist off-reservation Indians in their job search, the Montana United Indian Association (MUIA) operates a statewide Job Training Partnership Act program that provides training, job development, and placement services. The program has met with some success, but many obstacles still exist to the full employment of Indians in urban areas. These obstacles include: lack of marketable skills, job habits, alcoholism, substance abuse, cultural differences, family ties, and discrimination. Indians often find themselves in low-paying, short-term, unattractive jobs that result in a high turnover rate.

The major needs in the area of employment are training and education. The funds available are far short of what is necessary to effectively deal with the unemployment problems of off-reservation Indians. For example, the Rural Employment Opportunities, Inc., receives $700,000 in federal funding for 150 migrant farm workers. MUIA, on the other hand, receives $450,000 for 414 Indian participants.[24]

Discrimination was identified by all of the speakers as a barrier encountered by off-reservation Indians in their search for a better life. The Montana Commission for Human Rights is charged with enforcing laws that prohibit discrimination in employment, housing, public accommodations, financing and credit transactions, education, and government services because of race, color, and national origin. It has only been since 1987 that the Commission has maintained statistics showing the number of complaints filed by American Indians as a separate category. Over the last three years,

the number of cases filed by American Indians represented between 7% and 10% of the total cases filed. In the opinion of the Commission, the cases filed with them do not reflect even a small part of the race discrimination experienced by American Indians in Montana.[25] The Commission recently administered a fair housing grant from the Department of Housing and Urban Development that focused on rental housing discrimination facing minorities, particularly American Indians. The results showed that in over 50% of their attempts to obtain housing, minorities experienced discrimination. When the results were released to the media, a local landlords' association responded by justifying the discrimination with a long list of stereotypical assumptions about Indians. This response only strengthened the study's findings.

One of the major factors that may deter Indians from filing discrimination complaints may be an erroneous belief that Montana's civil rights laws do not apply to them. Instead, they seek solutions to off-reservation discrimination from the federal or tribal governments. One of the Committee members felt that American Indians often simply accept discrimination as a fact of life and do not report it to the proper authorities.

In addition to discrimination, off-reservation Indians encounter a variety of other problems in adjusting to life off the reservation. Non-Indian social service agencies do not understand the cultural differences that separate Indians from the non-Indian population. The loss of the extended family results in a lack of support for contending with problems, a loss of self-identity, and a breakdown in family unity. Indians lack experience in dealing with off-reservation non-Indian social service programs and are often intimidated by the bureaucracy they encounter. Many county social service agencies mistakenly believe that Indians are not entitled to their services either because they do not pay taxes or because they are the responsibility of the federal government.[26] There is also concern that tribal governments are not providing enough services to their off-reservation members.

Other than additional funding from the federal government, there were two

needs identified by the speakers that would greatly assist urban American Indians in their attempts to live off their reservations. These were the need for greater cooperation between state social service agencies, tribal governments, and urban Indian organizations for the delivery of services and the need for one statewide Indian organization that would represent all Indians, both on and off the reservation. After some discussion, the Committee agreed to consider a resolution encouraging state social service agencies to cooperate with Indian social service agencies.

SUMMARY

At its final meeting of the interim on October 11, 1990, the Committee discussed legislation for the upcoming session. The Committee considered five bills addressing the following topics:

(1) revision of nepotism law;
(2) designation of 1 PIR day for cultural awareness;
(3) funding for an Office of American Indian/Minority Achievement;
(4) a resolution urging appointment of an American Indian to the Board of Regents; and
(5) a resolution urging cooperation between state social service agencies and Indian social service agencies.

The Committee agreed to sponsor a bill that allows school districts, with a two-thirds vote by the district trustees, to hire people within the prohibited nepotism degrees. The bill also includes a provision for public notification of the hiring.

The Committee also agreed to sponsor a bill seeking state funding for an Office of American Indian/Minority Achievement in the Commissioner of Higher Education's office. The position is currently funded by a grant from the Northwest Area Foundation. Commissioner John Hutchinson wants to make the position a permanent one within his office.

After much discussion, the Committee decided not to sponsor a bill designating 1 PIR day for cultural awareness. While recognizing the need for increased Indian cultural awareness among public school teachers and administrators, the Committee was concerned about the cost to local school districts in implementing this PIR day and the availability of adequate resources to provide the required instruction. The issue merits further consideration, and the Committee may select it as a study topic next

interim.

The decision to sponsor a resolution urging the appointment of an American Indian to the Board of Regents was deferred until the issue could be discussed with Governor Stephens and the Regents. The Committee asked staff to forward the resolution urging cooperation between social service agencies to tribal chairpersons for comments before a final decision to introduce the resolution is made.

One of the duties of the Committee on Indian Affairs is to educate both Indians and non-Indians about each groups' governmental structures and institutions. At the Committee's first meeting on September 29, 1989, members heard a presentation by Brenda Desmond of the University of Montana Law School on tribal government and tribal court structures in Montana.[27] (Ms. Desmond was formerly a staff attorney for the Committee.) She provided general data on the Montana Indian population and the reservations and discussed tribal regulatory authority over internal and external relations. Ms. Desmond also reviewed tribal court jurisdiction. She noted that tribal courts resemble Anglo-American courts but also reflect tribal cultures and traditions. In addition, she stated that the Montana-Wyoming Tribal Court Judges Association is working toward establishing an intertribal appellate system for the participating tribes. During the next interim, the Committee plans to continue this education effort.

The Committee on Indian Affairs finished its first interim as a statutory committee with a feeling of accomplishment. The Committee took an indepth look at taxation, education, and the plight of urban Indians. The Committee's work in the area of education coincided with a renewed interest in Indian education on the part of the Office of Public Instruction and the Board of Public Education. The education bills being sponsored by the Committee have sparked an enthusiasm within the Indian education community for becoming involved in the legislative process--for many, a first experience. Education will continue to be a topic of major importance to the

Committee.

The topic of taxation is a perennial one but has taken on greater importance in recent years as tribal governments become more interested in taxation as a form of revenue. The recent Cotton Petroleum court decision that allows both tribal governments and states to levy taxes against businesses operating on Indian reservations has serious implications for both state and tribal economic development. The Committee will continue to monitor efforts at the federal level to address this issue of double taxation. The Committee may consider some state-level remedies next interim if federal efforts fail.

Traditionally, the Committee on Indian Affairs has concentrated its efforts on addressing issues of concern to state, local, and tribal governments. Roughly, 50% of Montana's Indian population resides off the reservations. The concerns of this group have largely been ignored by the Committee in the past. The Committee attempted to rectify this situation this interim by devoting one meeting to the concerns of urban Indians. During that meeting, some issues surfaced that may merit further study by the Committee during the next interim.

Other issues that the Committee expressed an interest in but was unable to study were health care and gambling. These issues may serve as study topics during the next interim.

NOTES

1. Connie F. Erickson, Lois Menzies, and Eddye McClure, "Taxation on Montana Indian Reservations," Montana Legislative Council, January 1990, p. 9.

2. William C. Canby, Jr., American Indian Law, West Publishing Company, St. Paul, 1981, p. 192.

3. Montana Legislature, Committee on Indian Affairs, Minutes of February 15, 1990, Montana Legislative Council, Helena, Montana.

4. Ibid.

5. Montana Legislature, Committee on Indian Affairs, Committee on Indian Affairs, 1987-1988 Activities, report prepared by Connie F. Erickson, Montana Legislative Council, Helena, Montana, December 1988, p. 23.

6. Testimony of Dave Schwab before the Committee on Indian Affairs, February 15, 1990, Helena, Montana.

7. Lewis Meriam, "The Problem of Indian Administration," Institute for Government Research, Washington, D.C., 1928.

8. 25 U.S.C.A. 461, et seq. (1934).

9. 25 U.S.C.A. 452 through 454 (1934).

10. Dr. Willard Bill, "From Boarding House to Self Determination," Office of Public Instruction, Helena, Montana, 1990, p. 25.

11. Indian Education Act (P.L. 92-318, 88 Stat. 334-345).

12. Ibid., pp. 32-33.

13. 25 U.S.C.A. 1801 through 1815 (1978).

14. Chapter 464, Laws of 1973.

15. Ibid.

16. Chapter 490, Laws of 1973.

17. House Joint Resolution No. 60, Laws of 1974.

18. "Indian Culture Master Plan," Montana Board of Public Education, Helena, Montana, December 15, 1975.

19. "'Minorities in Montana Education' Project," grant proposal submitted to the State Higher Education Executive Officers, Commissioner of Higher Education, Helena, Montana, December 1988, p. 7.

20. Deboreh Wetsit LaCounte, "A Plan for American Indian Education in Montana," draft report for Montana Tracks Project, Commissioner of Higher Education, Helena, Montana, August 1990, p. 6.

21. A.T. Anderson, Nations Within a Nation, The American Indian and the Government of the United States, American Indian Policy Review Commission, Washington, D.C., December 1976, p. 76.

22. "Montana Forum for Indian Education," transcription of recording, Board of Public Education and Office of Public Instruction, March 21, 1990, p. 11.

23. "Statistics in Brief," Montana Department of Labor and Industry, September 1990.

24. Testimony of Bernadine Wallace before the Montana Committee on Indian Affairs, Helena, Montana, September 1990.

25. Testimony of Anne MacIntyre before the Montana Committee on Indian Affairs, Helena, Montana, September 1990.

26. Testimony of Ernie Big Horn, Exhibit 9, Minutes of the Committee on Indian Affairs, Montana Legislative Council, September 13, 1990.

27. Brenda C. Desmond, "Statement to Legislative Committee on Indian Affairs," Montana Legislative Council, September 29, 1989.

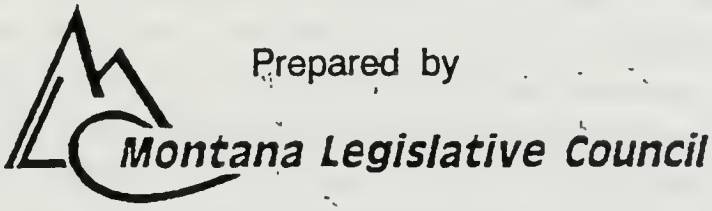
APPENDICES

TAXATION ON MONTANA INDIAN RESERVATIONS

January 1990

Research Report

Prepared by



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TAXATION ON MONTANA INDIAN RESERVATIONS

Prepared for the
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Montana Legislative Council

January 1990

INTRODUCTION

Taxation has become one of the most controversial issues in Indian affairs. As tribes begin to take advantage of economic development programs and as reservations' reserves of natural resources become more valuable, there is more activity on Indian reservations to tax. The federal government appears anxious for tribes to assume a greater share of the administrative responsibility and cost of reservation services. At the same time, state and local revenue systems are under increasing strain. The net effect of reservation economic development, of growing demands for state, local, and tribal services, and of increasing difficulty in raising local revenues is intensified competition for the reservation tax base and the ever "shrinking dollar".

The purpose of this report is to explore the issue of taxation in Indian country. Part I addresses the legal authorities of both the tribes and state to impose taxes. Part II discusses state taxation on Montana Indian reservations. Part III reviews taxes presently being imposed by Montana tribes.

PART I

TRIBAL AND STATE TAXING AUTHORITY

Tribal Taxation Authority

Tribal sovereign authority, as noted frequently by the United States Supreme Court, is subject to the "plenary" authority of Congress. The sovereign powers of a federally recognized tribe remain intact unless Congress explicitly and intentionally abrogates them. One of the powers essential to the maintenance of any government is the power to levy taxes. Tribes retain this power as an inherent attribute of tribal sovereignty that continues unless withdrawn or limited by treaty or by an act of Congress.

The power to levy taxes does not spring from the sovereign power of the United States but is derived from the inherent sovereignty of Indian tribes that predates the United States itself. As a result, the same taxes that the federal and state governments can impose on its citizens may be imposed by a tribe on its citizens. In view of the Supreme Court's decision in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978), which held that tribal courts had no criminal jurisdiction over non-Indians, attempts by tribes to tax non-Indians have been met with the contention that the tribes lacked the power. Since Oliphant, however, the Court has made it clear that tribes may indeed tax non-Indians by reiterating the historical foundations of tribal sovereignty.

Two years after Oliphant, the Court held in Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), that "[t]he power to tax transactions occurring on trust lands and significantly involving a tribe or its members is a fundamental attribute of sovereignty which the tribes retain unless divested of it by federal law or necessary implication of their dependent status". In Colville, no federal statute had taken the power away, and the power to tax non-Indians entering the reservation was not inconsistent with the tribes' domestic dependent status.

In 1981, the Supreme Court reaffirmed its broad view of tribal taxing power in Merrion v. Jicarilla Apache Tribe, 455 U.S. 130 (1982), which upheld a tribal severance tax applied to non-Indian lessees who mined oil and gas on the reservation. The lessees contended that tribal power to tax was based entirely on the right of the tribe to exclude nonmembers from the reservation and that the power to tax could not be exercised against lessees whose leases conferred a right of entry. In response, the Court explicitly recognized the inherent right of tribal taxation and rejected the lessees' limited view of the tribal taxing power by stating:

> The power does not derive solely from the Indian tribe's power to exclude non-Indians from tribal lands. Instead, it derives from the tribe's general authority, as sovereign, to control economic activity within its jurisdiction, and to defray the cost of providing governmental services. Merrion, 455 U.S. at 137.

Limitations on Tribal Taxation Authority

Unlike the state and federal governments, tribes are not limited by the Bill of Rights in the U.S. Constitution or by state constitutional provisions because Indian nations were preconstitutional and the 5th and 14th amendments operate only to control federal and state actions. Talton v. Mayes, 163 U.S. 376 (1896). If limits on tribal taxation authority exist, they may come instead from three sources: (1) federal statutes imposed under the Indian commerce clause of Article I, sec. 8, cl. 3, of the U.S. Constitution; (2) congressional plenary power; and (3) other federal legislation (Indian Reorganization Act, Indian Civil Rights Act, and Public Law 280).

Commerce Clause. The commerce clause of the U.S. Constitution grants Congress the power to regulate commerce "among the several States, and with the Indian Tribes". U.S. Const. Art. I, sec. 8, cl. 3. The Supreme Court has distinguished between congressional power to regulate commerce among the states and power to regulate commerce among Indian tribes by referring to the former as the "interstate commerce clause" and the latter as the "Indian commerce clause".

While the interstate commerce clause has been used to limit state authority, the Court in Merrion noted that the Indian commerce clause has historically been used only to protect Indian tribes against state and local interference and not to limit tribal activity. Merrion, supra at 153-54. The Court left open the question of whether the Indian commerce clause allows tribes to regulate commerce without restraint. Id. While the Court observed that the interstate commerce clause had not been applied to limit the actions of tribes, it analyzed the tribal oil and gas tax at issue in Merrion to determine whether it violated the "negative implications" of the interstate commerce clause by unduly burdening or discriminating against interstate commerce. The Court noted the Solicitor General's suggestion, filed in a brief supporting the tribal tax, that "if restrictions are imposed on tribal activity, the restrictions must arise from the Indian Commerce Clause, and not its interstate counterpart". Id. While such restrictions have not yet been defined, one can assume that tribal taxes will be scrutinized for Indian commerce clause "negative implications" in much the same way state taxes are under the four-part test established in Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977), and applied gratuitously to the tribal tax in Merrion.

As interpreted by the Court in Merrion, a state tax, and impliedly also a tribal tax, will be sustained if: (1) it relates fairly to the services provided by the taxing entity; (2) it is fairly apportioned; (3) it does not discriminate against interstate commerce; and (4) it applies to an activity with a substantial nexus with the taxing entity. One commentator believes that the Court in Merrion left open the question of whether or not the Indian commerce clause allows unrestrained tribal regulatory actions. See S. Fulwood, Utah L. Rev. 729 (1986). Thus, it is unclear the extent to which either commerce clause limits tribal taxation powers. Analysis by the Court in Merrion suggests that if Indian tribes are subject to some kind of commerce clause limitation, the traditional four-part test developed to limit states' taxation powers would apply.

Congressional Plenary Power. As noted earlier, Congress has plenary power to extinguish tribal government actions, along with a lesser power to place limitations on tribal authority. In this regard, courts have stated that there must be a clear congressional intent to divest a tribe of its powers. See Bryan v. Itasca County, 426 U.S. 373 (1976); McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973); and Colville. If an ambiguity exists on intent, courts have stated that such doubt benefits the tribe because "[a]mbiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence". See White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 (1980).

According to Felix Cohen, noted Indian law expert:

> [w]hat is not expressly limited remains within the domain of tribal sovereignty. External powers are extinguished upon being conquered. Internal powers are not extinguished. Internal powers include: the right of a tribe to adopt and operate under a form of government of the Indian's choosing; . . . to levy taxes; to regulate property within the jurisdiction of the tribe; . . . and to administer justice. F. Cohen, Handbook of Federal Indian Law (1942).

Other Federal Legislative Limitations. Arguments have been raised that tribal taxing authority is limited by: the Indian Reorganization Act's requirement for prior approval by the Secretary of Interior; the Indian Civil Rights Act's due process and equal protection provisions; and Public Law 280's tribal civil jurisdiction limitations.

The Indian Reorganization Act of 1934 (IRA) authorized, in part, constitutional reorganization of tribal governments. Many federally approved, tribally adopted constitutions required Secretary of Interior approval for provisions granting taxing authority over persons and businesses within tribal jurisdiction.

In Merrion, the Court held that because the IRA was an act by Congress, review by the Court of the tax at issue was precluded. See

Merrion, 455 U.S. at 155-56. The Court emphasized the federal checkpoint effect associated with the prior approval requirement. However, two years later in Kerr-McGee Corporations v. Navajo Tribe of Indians, 731 F.2d 597 (9th Cir. 1984), aff'd, 105 S. Ct. 1900 (1985), the Ninth Circuit extinguished this requirement by finding "no Congressional intent" to recognize "only" those tribal taxes authorized by IRA constitutions and subsequently approved by the Secretary of Interior. Kerr-McGee, 731 F.2d at 598, aff'd, 105 S. Ct. at 1903. The Court added that tribes are free, with Interior Department backing, to amend their constitutions to remove the Secretary of Interior approval requirement. Id.

With passage of Public Law 280 in 1953, Congress gave six named states, commonly known as the "mandatory" states, extensive criminal and civil jurisdiction over Indian country. Public Law 280, 67 Stat. 588, 18 U.S.C.A. sec. 1162 (1953). In other states with Indian populations, including Montana, assumption was optional. In 1976, the Supreme Court held that the civil grant of authority under Public Law 280 was limited to adjudicatory jurisdiction only and did not extend to civil regulatory authority. Bryan. As a result, Public Law 280 poses little threat to tribal governments that levy taxes authorized by their civil constitution or inherent jurisdictional powers.

Tribal governments are not limited by the provisions of the Bill of Rights or the 14th amendment to the U.S. Constitution. However, in 1968, Congress passed the Indian Civil Rights Act (ICRA), which imposes on tribes the basic requirements of freedom of speech, free exercise of religion, due process and equal protection under tribal law, and just compensation for property taking. As a result, when implementing taxes, tribal governments, similar to states, are required to justly compensate if private property is taken for public use and must assure due process and equal protection in the application of their taxes.

As a result, some have argued that, similar to states, tribal governments should be required to show a "nexus" or have "sufficient

contacts" before imposing taxes or acquiring personal jurisdiction over noncitizens. Additionally, many non-Indians who have no voice in tribal government have charged that tribal taxes constitute "taxation without representation" in violation of the equal protection guarantees of the ICRA.

The due process clause requires only a "minimal connection" between interstate commerce and the taxing entity and a "rational relationship" between the taxing entity and the value generated by the party bearing the incidence of the tax. See Fulwood at 739.

One writer has suggested that the due process argument could be overcome by implementing the three-part test set out by the Supreme Court in Montana v. United States, 450 U.S. 544 (1981). McAnally, Tribal Taxation: Offense & Defense: How to Pay Tribal Tax Hardball, Univ. of Montana Law School (1987). McAnally notes that while the court in Montana ruled that the Crow Tribe had lost regulatory jurisdiction over the bed and banks of the Bighorn River when Montana became a state, it outlined the test and announced:

> . . . Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. **A tribe may regulate through taxation, licensing, and other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements.** . . . A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct **threatens or has some direct effect on the political integrity, the economic security, or health or welfare of the tribe.** [Emphasis added] Montana.

The Ninth Circuit Court of Appeals applied the Montana test when it upheld the tribes' authority to regulate nonmembers riparian rights on the Flathead Reservation. See Confederated Salish and Kootenai Tribes of Flathead Reservation, Montana v. Namen, 665 F.2d 951 (9th Cir. 1982), cert. denied, 459 U.S. 977 (1982). In Namen, the court rejected nonmember claims of disenfranchisement and that the tribes were depriving them of their property rights in violation of fifth amendment due process and equal protection rights. The Namen

court dismissed the fifth amendment claim, stating that habeas corpus is the exclusive remedy for enforcing the Bill of Rights provisions against tribal governmental action under the ICRA. Previously, the Supreme Court had held habeas corpus to be the sole remedy under the ICRA in Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978).

Concerning the claim by non-Indians of disenfranchisement, the Namen court cited the Supreme Court ruling in United States v. Mazurie, 419 U.S. 544 (1975), which had rejected the general proposition that applying tribal laws to nonmembers was unconstitutional solely because nonmembers could not participate in tribal government. Writing for the Court, Justice Rehnquist stated, "[t]he fact that the Mazuries could not become members of the tribe, and therefore could not participate in the tribal government, does not alter our conclusion". Id. at 557-58. While Mazurie involved an expressed congressional delegation of powers rather than inherent tribal sovereignty, the court in Namen found the difference irrelevant to the disenfranchisement argument. Namen, 665 F.2d at 965, n. 31. Likewise, the Court in Merrion firmly announced:

> Requiring the consent of the [reservation] entrant deposits in the hands of the excludable non-Indian the source of the tribe's power, when the power instead derives from sovereignty itself. Only the federal government may limit a tribe's exercise of its sovereign authority. Indian sovereignty is not conditioned on the assent of a nonmember; to the contrary, the nonmember's presence and conduct on Indian lands are conditioned by the limitation the tribe may choose to impose. Merrion, 455 U.S. at 147, citing United States v. Wheeler, 435 U.S. 313, 322 (1978).

State Taxation Authority

Within Indian country, and particularly where Indian interests are affected, the powers of a state to tax are severely limited. In 1832, the Supreme Court held that state laws "can have no force" in Indian country without the consent of Congress. Worcester v. State of Georgia, 31 U.S. 515, 561 (1832). In 1866, the Supreme Court settled a long-standing debate by declaring that a state had no power to tax Indian trust lands, whether held tribally or in allotments. The Kansas

Indians, 72 U.S. (5 Wall.) 737 (1866). Congress even required this exclusion to be written into the constitutions of several western states as conditions of their admission into the Union. While Congress has on occasion specifically authorized some state taxation, the general rule is that in the absence of congressional authorization, the state may not tax receipts from Indian trust property.

Despite these decisions, states have persisted in their attempt to control reservation activities even without congressional consent. In 1881, the Supreme Court held that a state could prosecute a non-Indian for killing another non-Indian on an Indian reservation. United States v. McBratney, 104 U.S. 621 (1881). In 1885, the Court held that a state could levy a personal property tax on the property of a non-Indian if the property was located on an Indian reservation. Utah and N. R. Co. v. Fisher, 116 U.S. 28 (1885). With these cases, the Court for the first time admitted that in certain situations, a state could regulate reservation activities without the consent of Congress. Despite its 1832 ruling, it was no longer true that state laws could have no force within Indian country.

With this admission, the Court needed to establish some type of test to determine which state laws could be enforced in Indian country without congressional consent. Over the years, the Court has developed two independent, yet related, tests: the federal preemption test and the infringement test.

To be valid, a state law must pass both the preemption test and the infringement test to levy taxes in Indian country. Additionally, all state laws affecting reservation activities will be viewed against the "backdrop" of inherent tribal sovereignty or the inherent right of a tribe to be self-governing and to regulate its own affairs. As explained by the Supreme Court in 1980, these two barriers are "independent because either standing alone, can be a sufficient basis for holding state law inapplicable to activity undertaken on the reservation", but they are related in the fact that "traditional notions of Indian self-government are so deeply ingrained in our jurisprudence that they have

provided important 'backdrop' against which" the state law must be viewed. See Bracker, 448 U.S. at 142.

Federal Preemption

Simply stated, a state law that violates federal law violates the federal preemption test. All that is required is for the federal government to have so heavily regulated a certain activity that "no room remains for state laws imposing additional burdens" on anyone involved in that activity. Warren Trading Post Co. v. Arizona State Tax Commission, 380 U.S. 685, 690 (1965). Once Congress has taken a matter "fully in hand", it creates a monopoly, and state laws are not permitted to "disturb and disarrange the statutory plan" that Congress has created. Id. at 691.

The classical preemption case is Warren, in which the Court held that Arizona could not tax the gross receipts of a non-Indian trading post on the Navajo Reservation. The Court noted that the Indian traders were required to be federally licensed and were subject to extensive federal regulation that took the business of Indian trading "so fully in hand that no room remains for state laws imposing additional burdens upon traders". Id. at 691.

In Warren and subsequent cases, the Court examined treaties and statutes to determine whether the broad policies that underlie them, including the principle of tribal independence, would be frustrated by the operation of the state law at issue.

In a 1973 case, the Court, after reviewing federal treaties in which the government assured the Navajos of relative independence from state jurisdiction, held that Arizona could not require a Navajo Indian to pay income taxes on income earned from reservation employment. When viewed against the backdrop of tribal sovereignty, the Court held that reservation employment is "totally within the sphere which the relevant treaties and statutes leave for the Federal Government and for the

Indians themselves". McClanahan, 411 U.S. at 179-80.
In more recent cases, the Court applied the preemption test to invalidate state taxes imposed on non-Indian contractors contracted to cut, haul, and sell tribal timber, with the tribe sharing in the profits. Bracker. In this case, Arizona had levied a tax on the fuel used in the hauling and on the gross receipts obtained from the sale of the tribe's timber. In ruling that the state taxes were preempted by extensive federal regulations applying to timber operations in Indian country, the Court made it clear that preemption did not require an express congressional declaration invalidating state taxes.

The reach of the preemption test is perhaps best illustrated in another 1980 decision in which a non-Indian company sold some farm equipment to a tribal corporation. Central Machinery Co. v. Arizona State Tax Commission, 448 U.S. 160 (1980). As in Warren, the sale took place on the reservation, and payment and delivery were made there. However, unlike in Warren, the company itself was located off the reservation and had not obtained a federal trader's license as required by federal law. Following the sale, Arizona imposed the same gross proceeds tax it had attempted to impose in Warren. In preempting the tax, the Court held that even this reservation sale by an unlicensed company located outside the reservation was beyond state control because reservation trade was too heavily regulated by the federal government to allow the state to impose additional burdens. At the same time, if non-Indian building contractors are not subject to the federal trading statutes, the court has permitted a state to apply a gross receipts tax. Mescalero Apache Tribe v. O'Cheskey, 625 F.2d 967 (10th Cir. 1980), cert. denied, 450 U.S. 959 (1981).

Infringement of Tribal Self-Government

The second barrier to a state's taxing power was established in a 1959 case in which the Supreme Court held that a state law may not infringe "on the right of reservation Indians to make their own laws and be ruled by them". Williams v. Lee, 358 U.S. 217 (1959). This principle has become known as the "infringement test" and focuses on

and protects the inherent right of Indian tribes to be self-governing. Any state law that interferes with this right will fail the infringement test. While useful in measuring the validity of a state's power over non-Indians, the Court has held that the infringement test should not be offered as a support for the proposition that a state may regulate tribal members in Indian country so long as there is no interference with self-government. McClanahan. When properly applied, the infringement test bears a close relation to the principle of federal preemption and, for that reason, is often applied as a secondary barrier against state taxation.

The fact that a tax upon a non-Indian may ultimately impact the economy of a tribe is not enough to defeat the tax. Courts have allowed states to impose a possessory interest tax on non-Indian lessees of trust lands even though the tax reduced the amount of rental fees the tribes were able to obtain for their land. See Aqua Caliente Band of Mission Indians v. County of Riverside, 442 F.2d 1184 (9th Cir. 1971), cert. denied, 405 U.S. 933 (1972); and Fort Mojave Tribe v. San Bernardino County, 543 F.2d 1253 (9th Cir. 1976), cert denied, 430 U.S. 983 (1977).

On occasion, tribes have argued that a tribal tax upon a particular activity preempts the state from taxing the same activity. However, the Supreme Court rejected this argument in a 1980 case in which both the tribe and state had imposed a tax on cigarettes sold in tribal shops on the reservation. The Court stated:

> There is no direct conflict between the state and tribal schemes, since each government is free to impose its taxes without ousting the other. Although taxes can be used for distributive or regulatory purposes, as well as for raising revenue, we see no nonrevenue purposes to the tribal taxes at issue in these cases, and, . . . we perceive no intent on the part of Congress to authorize the Tribes to pre-empt otherwise valid state taxes. Colville.

In 1989, the Court reaffirmed this position by upholding New Mexico's authority to impose a tax on non-Indian oil and gas production on the reservation despite the existence of a tribal tax. Cotton Petroleum

Corporation v. New Mexico, No. 87-1327 (U.S. Sup. Ct., April 25, 1989). Currently, then, non-Indians doing business on Indian land may be taxed both by tribes and by states.

Any time an Indian leaves the reservation, he or she becomes subject to the same state laws applicable to everyone else, unless a federal law or treaty confers a special immunity. In a 1973 decision, the Supreme Court held that "absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory State law otherwise applicable to all citizens of the State". Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148-49 (1973). As a result, a tribal business may be exempt from state taxes while it is located on the reservation, but as soon as it moves off the reservation, it becomes fully subject to the state's taxing powers. Id. Indians who leave the reservation to engage in a federally protected activity, such as exercising treaty hunting and fishing rights, carry with them their general immunity from state law. See Antoine v. Washington, 420 U.S. 194 (1975); and Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658 (1979). Except for this type of situation, Indians who are outside the reservation for any reason and for any length of time are subject to state law.

PART II

STATE TAXATION ON MONTANA INDIAN RESERVATIONS

According to Department of Revenue officials, state taxes are imposed on all persons residing or conducting business on Montana Indian reservations unless state or federal law or a court ruling prohibits imposition of a particular tax.* Among those persons residing or conducting business on a reservation, non-Indians and Indians who are not members of the tribe that governs the reservation (i.e., nonmember Indians) are treated alike for state tax purposes. Both groups are subject to most state taxes. In contrast, Indians who are members of the tribe that governs the reservation (i.e., tribal members) are subject to some state taxes and exempt from others. In addition, most state taxes are not imposed on tribal governments.

This part reviews some of the taxes imposed by the Department of Revenue and describes the Department's policy concerning the imposition of taxes on Indian reservations. Unless otherwise indicated, non-Indians and nonmember Indians are subject to the taxes described below, while tribal governments are exempt from payment of these taxes.

Coal Taxes

State taxes on coal production include the following:

Severance Tax. Section 15-35-103, MCA, requires a producer of more than 50,000 tons of coal in a calendar year to pay a severance tax upon all coal produced in excess of the first 20,000 tons. The severance tax rates vary according to the coal's heating quality (i.e., BTU per pound) and the type of mining used to produce the coal. The rates are scheduled to

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* Interview with Dave Woodgerd, Chief Legal Counsel, and Steve Bender, Bureau Chief, Research Bureau, Department of Revenue, December 1, 1989.

decrease each fiscal year through fiscal year 1992. The fiscal year 1990 rates are listed on the following page.

COAL SEVERANCE TAX RATES
Fiscal Year 1990

BTU per Pound of Coal	Surface Mining	Underground Mining
Under 7,000	17% of value*	3% of value
7,000 or over	25% of value	4% of value

Under 15-35-202, MCA, a producer is entitled to a new coal production incentive tax credit, against the severance tax, of 40 percent for incremental production** sold during fiscal year 1990.

Gross Proceeds Tax. Section 15-23-703, MCA, requires a producer annually to pay a tax equal to 5 percent of the value of the gross proceeds from coal production.

Resource Indemnity Trust Tax. According to 15-38-104, MCA, a producer must pay an annual tax of $25 plus 0.5 percent of the gross value of the coal produced in excess of $5,000.

Currently, there is no coal production on Montana Indian reservations. However, the Westmoreland Company, a non-Indian lessee, continues to mine coal on the Ceded Strip, an area of land adjoining the northern boundary of the Crow Reservation. Because of the ruling in Crow Tribe v. Montana, 108 S. Ct. 685 (1988), which held invalid the

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* The value of the coal is the contract sales price, which is the price of the coal extracted and prepared for shipment f.o.b. mine, excluding the amount charged by the seller to pay taxes paid on production (15-35-103(2) and 15-35-102(5), MCA).

** According to 15-35-102, MCA, incremental production means that "quantity of coal produced annually by a coal mine operator and sold to a qualified purchaser that exceeds the base production level of the coal mine operator for that purchaser, but only to the extent the quantity of coal exceeds that purchaser's base consumption level from all Montana producers".

imposition of the state's severance and gross proceeds taxes on coal mined on the Ceded Strip and on a reservation, these taxes are no longer applied to non-Indian lessees. The Department of Revenue continues to impose the resource indemnity trust tax, but Westmoreland has protested paying the tax. This issue is now before the State Tax Appeal Board.

Oil and Gas Taxes

State taxes on oil and gas production include the following:

Severance Taxes. Section 15-36-101, MCA, requires an oil producer annually to pay a severance tax of 5 percent of the total gross value of all petroleum and other mineral or crude oil production (other than interim or new production) from each lease or unit. A natural gas producer annually must pay a severance tax of 2.65 percent of all natural gas production (other than interim or new production) from each lease or unit.*

Net Proceeds Taxes. According to 15-23-607, MCA, an oil producer must pay a tax of 7 percent of net proceeds on interim production** or new production*** of oil. A gas producer must pay a tax of 12 percent of net proceeds on interim production or new production.

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* In addition to the state severance tax, oil and gas producers must also pay a local government severance tax in lieu of a tax on net proceeds (15-36-101, MCA).

** Interim production means the production of oil or gas from any well that: (1) has not produced oil or gas during the five years immediately preceding the first month of interim production; and (2) began interim production after June 30, 1985, and before April 1, 1987 (15-23-601(2), MCA).

*** New production means the production of oil or gas from any well: (1) that has not produced oil or gas during the five years immediately preceding the first month of qualified new production; and (2) on which proper notification to the Department of Revenue was given (15-23-601(3), MCA).

Privilege and License Tax. Section 82-11-131, MCA, requires an oil and gas producer to pay a quarterly tax of 0.2 percent of the market value of all oil or natural gas produced, stored, or marketed within the state.

Resource Indemnity Trust Tax. Oil and gas producers are subject to the same resource indemnity trust tax imposed on coal producers. (See discussion on page 15.)

Currently, most oil and gas produced on reservation lands owned by Montana tribes or tribal members is being produced by non-Indian lessees. Royalties paid to an Indian tribe as a result of a lease entered into under the Indian Mineral Leasing Act of 1938 are exempt from state taxes (15-23-631, MCA). However, the state does impose taxes on the non-Indian producer's interests associated with oil and gas production. Producers have filed over 100 law suits in various state district courts challenging imposition of state taxes on oil and gas production on the Blackfeet, Fort Peck, and Rocky Boy's Reservations. As a result of the ruling in Cotton Petroleum Corporation v. New Mexico, No. 87-1327 (U.S. Sup. Ct., April 25, 1989), some producers have withdrawn their suits and released their protested taxes to the state. The Cotton decision recognized both the tribe's and the state's authority to tax oil and gas produced by non-Indian lessees on the reservation.

Real Property Tax

In Montana, three factors determine a property owner's tax liability: the taxable rate for the class to which the property is assigned; the market value of the property; and the mill levy in the jurisdiction in which the property is located.* Residential and commercial real property are

* An exception occurs for net or gross proceeds on coal, oil, and natural gas production, which are exempt from mill levies. Instead, these proceeds are subject to flat-percentage assessments (15-23-607 and 15-23-703, MCA).

classified as class four property and taxed at 3.86 percent of their market value (15-6-134, MCA).

The Department of Revenue imposes no taxes on land held in trust by the federal government on behalf of a tribe or individual tribal members (i.e., trust lands). Likewise, nontrust land (i.e., fee land) located on a reservation and owned by a tribe is exempt from taxation. However, fee land owned by individual tribal members is subject to state taxes. Three cases have been filed challenging the imposition of state taxes on fee land located on the Blackfeet, Crow, and Fort Peck Reservations that is owned by individual tribal members.

The issue of taxation of fee land owned by tribal members was recently addressed in a Washington State case, Confederated Tribes and Bands of the Yakima Nation v. County of Yakima, ___ F.2d ___, No. 88-3926 (9th Cir. 1990). In this case, the U.S. Ninth Circuit Court of Appeals reversed a U.S. district court ruling that fee land was not taxable. The Ninth Circuit held that the General Allotment Act, 25 U.S.C. §349, permits taxation of fee lands. However, the court remanded the case to the district court to further examine the issue of "checkerboard jurisdiction".*

Cigarette Tax

Most cigarettes sold in Montana are subject to a tax of 18 cents on each package containing 20 cigarettes; if a package contains more or less than 20 cigarettes, the tax on each cigarette is equal to 0.9 cents (16-11-111, MCA). This excise tax, which is precollected by licensed wholesalers who must affix an insignia to each package within 72 hours after receipt of the cigarettes, must be included in the retail price of the cigarettes (16-11-112 and 16-11-113, MCA).

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* "Checkerboard jurisdiction" refers to a pattern of jurisdiction in which the jurisdictional status of land varies from parcel to parcel. Congress and the U.S. Supreme Court have generally found this condition on the reservation to be undesirable.

Tribal members who purchase cigarettes on a reservation are legally exempt from paying the cigarette tax; this exemption does not extend to non-Indians or nonmember Indians. However, since the Department of Revenue does not require wholesalers who sell cigarettes to on-reservation tribal retailers to precollect the cigarette tax, all purchasers of cigarettes from tribal retailers are able to avoid paying the tax.

In Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463 (1976), and in Washington v. Confederated Tribes of Colville Indian Reservation, 447 U.S. 134 (1980), the United States Supreme Court upheld a state's right to require a tribal retailer to collect and remit to the state a tax on sales of cigarettes to non-Indians and nonmember Indians. To date, the Department of Revenue has not asserted its authority to impose the tax.

During the 1989 legislative session, Senate Bill No. 440, requiring wholesalers to precollect the state's cigarette tax on all cigarettes sold to Indian retailers, was introduced. The bill, which died in the Senate Taxation Committee, permitted wholesalers to apply to the Department for a refund of or credit for taxes precollected on cigarettes sold by retailers to tribal members. The total amount of refunds or credits allowed by the Department to a wholesaler could not exceed an amount equal to the average individual consumption of cigarettes, as determined by Department rule, multiplied by the tribal member population on the reservation.

Alcoholic Beverage Taxes

State alcoholic beverage taxes include the following:

Liquor Excise Tax. Under 16-1-401, MCA, the Department of Revenue is required to collect an excise tax of 16 percent of the retail selling price of liquor sold in the state.

Liquor License Tax. Section 16-1-404, MCA, requires the Department to collect a license tax of 10 percent of the retail selling price of liquor sold in the state.

Beer Tax. A tax of $4.30 per barrel of 31 gallons of beer sold in Montana is imposed on wholesalers under 16-1-406 and 16-1-408, MCA.

Table Wine Tax. The Department levies a tax of 27 cents per liter on table wine imported by wine distributors or the Department (16-1-411, MCA).

The Department of Revenue extends its authority to regulate and tax alcoholic beverage sales onto the reservation. Tribal members buying liquor at a state liquor store on the reservation are subject to the liquor excise and license taxes at the time of purchase. Beer and table wine taxes are indirectly paid by tribal members when retailers include the taxes as part of the retail price of their products. Also, a tribal member must be licensed by the state to sell liquor, and liquor sold by a tribal retailer must be purchased from the state.

Motor Fuel Taxes

State motor fuel taxes include the following:

Gasoline Distributor's License Tax. According to 15-70-204, MCA, a distributor must pay a license tax of 1 cent for each gallon of aviation gasoline and 20 cents for each gallon of other gasoline distributed in the state. The latter tax is imposed only on gasoline used to propel vehicles on public streets and highways; the tax is refundable if the gasoline is used for other purposes.

Diesel Fuel/Volatile Liquids Tax. Sections 15-70-321 and 15-70-322, MCA, require a dealer, or a user if the fuel is not acquired through a dealer, to pay a tax of 20 cents for each gallon of

diesel fuel or other volatile liquid of less than 46 degrees A.P.I. (American Petroleum Institute) gravity test (except liquid petroleum) sold in the state. The tax is imposed only on fuel used to propel vehicles on public streets or highways or on public construction projects. The tax is refundable if the fuel is used for other purposes.

Motor fuel taxes paid by distributors and dealers are included in the retail sale price of the fuel. All purchasers of motor fuels on the reservation, including tribal governments and individual tribal members, are subject to these taxes. Recently, a member of the Fort Peck Tribe filed suit against the Department of Revenue, challenging the state's authority to impose motor fuel taxes on tribal members. An issue under consideration is whether the tribe may purchase fuels tax-free for resale through reservation outlets.

PART III

TRIBAL TAXATION ON MONTANA INDIAN RESERVATIONS

Although an Indian tribe has the authority to levy taxes on its citizens, many tribes have been reluctant to do so because of traditional Indian hostility to taxation and the extensive poverty that exists on many Indian reservations.[1] However, because of dwindling natural resources and decreasing federal support, many tribes are turning to taxation as a source of revenue to fund tribal operations and services.

In Montana, there are currently four Indian tribal governments levying taxes on their respective reservations. Those tribes that do not levy taxes generally charge fees for business or recreation licenses. Some of these tribes are also considering the implementation of some taxes on their reservations.

The most common taxes levied on Indian reservations are those on natural resources. Taxes on cigarettes and utilities and a possessory interest tax are also levied by different tribes. The following is a description of the various taxes currently being levied by tribes on Montana reservations.

Natural Resource Taxes

Severance Tax. An oil and gas severance tax is imposed by the Assiniboine-Sioux Tribes on the Fort Peck Reservation. The tax is levied on the production of oil and gas on land that is held in trust for the tribes or for individual Indians. The tax rate is 7 percent of the market value at the well of all trust oil and gas produced, saved, and sold or transported from the field where it is produced. The tax does not apply to any interest of the tribes in such oil and gas, nor does it apply to the royalty or other interest in such oil and gas of the United States or of any Indian for whom the land from which it was produced is held in trust.

The Blackfeet Tribe also imposes a severance tax on oil and gas production. The tax is computed at the following rates:

(1) 2.1 percent of the total gross value of petroleum and mineral or crude oil produced from each lease or unit in the calendar quarter, not in excess of an amount obtained by multiplying the number of producing wells on the lease by 450 barrels;

(2) 2.65 percent of the total gross value of petroleum and mineral or crude oil produced from each lease or unit in each calendar quarter in excess of an amount obtained by multiplying the number of producing wells on the lease by 450 barrels;

(3) 2.65 percent of the total gross value of natural gas produced from each lease.

The Crow Tribe levies a severance tax of 25 percent on coal mined on the reservation and on the ceded area located adjacent to the exterior boundary of the reservation.

Resource Indemnity Trust Tax. An oil or gas producer operating within the Blackfeet Reservation must pay to the tribe an annual tax of $25 per well plus 0.5 percent of the gross value of the product at the time of extraction from the ground if it is in excess of $5,000. The revenue from this tax is used by the tribe to improve the natural environment of the reservation, including correcting damage caused by natural resource development.

Privilege Taxes

Construction Business. The Fort Peck Tribes levy a "privilege of operating construction business tax". The tax is levied on any person or entity engaged in contracts for the improvement of real estate of any kind on trust land. The tax rate is 0.5 percent of the gross receipts from each prime contract for realty improvement on trust land. The tax does not apply to the tribes, any agency of the tribes, or to any business wholly owned by the tribes. Moreover, the tax does not apply to any contract from which the gross receipts are less than $100,000.

Oil and Gas Production. The Blackfeet Tribe levies a privilege tax to fund the enforcement of the "oil and gas production taxes" ordinance and for the support of the Tribal Tax Commission. The rates are as follows:

(1) 5 cents per barrel of crude petroleum on wells producing 25 barrels or less per day;

(2) 10 cents per barrel of crude petroleum on wells producing more than 25 barrels per day;

(3) 5 mills per 10,000 cubic feet of natural gas when gas is marketed for less than 15 cents per 1,000 cubic feet;

(4) 10 mills per 10,000 cubic feet of natural gas when gas is marketed for 15 cents or more per 1,000 cubic feet.

In addition to the privilege tax, the Blackfeet Tribe also charges a drilling permit fee, ranging from $25 to $150, depending upon the depth of the well.

Utility Tax

A utility tax was initiated by the Fort Peck Tribes in 1987. A utility is defined as "any publicly or privately owned railroad; communications, telegraph, telephone, electric power or transmission line; natural gas or oil pipeline; or other similar system for transmitting or distributing services or commodities". The definition does not include roads or highways constructed or maintained by any governmental entity. The tax rate is 3 percent of the value of the utility property, with the exception of rural cooperative telephone or electrical associations operated not-for-profit that are taxed at 1 percent of value. The value is the full value per linear mile of the utility as assessed by the State of Montana, multiplied by the number of miles of the utility located on trust land within the reservation. The tax does not apply to the tribes, any subdivision, agency, or program of the tribes, or to any enterprise wholly owned by the tribes; to the United States government or any of its agencies; or to any utility property on trust lands with a total value of less than $200,000. This tax ordinance also created a Tribal Tax Commission for the purpose of hearing challenges to the value of the utility property.

The Crow Tribe is currently considering the imposition of a utility tax on its reservation.

Cigarette Tax

At the Fort Belknap Reservation, the Tribal Council imposes an excise tax of 5 cents per package of cigarettes.

Possessory Interest Tax

A possessory interest tax is levied by the Blackfeet Tribe. By possessory interest is meant:

> any non-exempt interest in real property within the exterior boundaries of the Blackfeet Indian Reservation including the value of any property or improvement thereon. Examples of such interests include: (1) those held in fee (2) those held under lease (3) those held under permit (4) those held under an easement or right-of-way.[2]

The tax rate is 4 percent of the market value of the possessory interest.* The tax does not apply to a utility that exclusively serves the reservation; to a possessory interest held by the United States, the Blackfeet Tribe, the State of Montana, or by counties, cities, towns, or school districts within the state; to a possessory interest used as a homesite, farm, or ranch; or to a possessory interest in property that is used as a commercial business.

Income Tax

The Fort Belknap Tribes are considering an income tax of 1.5 percent. This would be levied on all reservation inhabitants, with an exemption for those who pay state income tax.

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* The market value is that value on the assessment books of the county assessor for the county or counties in which the property is located as apportioned to the reservation. The ordinance provides for an independent appraisal as an alternative to accepting the market value set by the county. Both the taxpayer and the tribal Tax Administration Division must agree to the independent appraisal.

Motor Vehicle Tax

The Fort Belknap Tribes are considering the imposition of an annual $10 license fee per motor vehicle on the reservation.

ENDNOTES

1. William C. Canby, Jr., American Indian Law, West Publishing Company, St. Paul, 1981, p. 192.

2. "Resolution No. 213-87 Amending the Blackfeet Possessory Interest Tax Ordinance No. 80," Blackfeet Tribal Business Council, Browning, Montana, 1987, p. 2.

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Proposed Legislation

*** BILL NO. ***** LC0041

INTRODUCED BY **********

A BILL FOR AN ACT ENTITLED: "AN ACT REMOVING THE PROVISION THAT MADE THE ELIMINATION OF EMPLOYMENT PREFERENCE PROVIDED TO VETERANS AND THEIR ELIGIBLE SPOUSES UNDER THE MONTANA VETERANS' AND HANDICAPPED PERSONS' EMPLOYMENT PREFERENCE ACT TEMPORARY; REPEALING SECTION 19, CHAPTER 646, LAWS OF 1989; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. **Repealer.** Section 19, Chapter 646, Laws of 1989, is repealed.

NEW SECTION. Section 2. **Effective date.** [This act] is effective on passage and approval.

-End-

Proposed Legislation

*** BILL NO. ***** LC0147

INTRODUCED BY **********

BY REQUEST OF THE COMMITTEE ON INDIAN AFFAIRS

A BILL FOR AN ACT ENTITLED: "AN ACT APPROPRIATING MONEY TO THE COMMISSIONER OF HIGHER EDUCATION FOR AMERICAN INDIAN/MINORITY ACHIEVEMENT PURPOSES."

WHEREAS, American Indians account for approximately 6% of Montana's population; and

WHEREAS, less than 3% of the enrollment in the Montana University System is American Indian; and

WHEREAS, by the year 2000, a high school diploma will provide an opening to only 49% of available jobs; and

WHEREAS, between the present and the year 2000, one-third of the new jobs created will be filled by college graduates; and

WHEREAS, Montana's economic future depends upon a well-educated work force.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

NEW SECTION. Section 1. **Appropriation.** There is appropriated to the commissioner of higher education

from the general fund $175,648 for the biennium ending June 30, 1993, to support the staff and operation of the director of American Indian/minority achievement.

NEW SECTION. Section 2. **Purpose of appropriation.** The director of American Indian/minority achievement shall use the money appropriated in [section 1] to improve the recruitment and retention of American Indians in higher education by:

(1) continuing the data collection and analysis begun by the Montana tracks project;

(2) serving as a consultant to the Montana university system campuses and vocational-technical centers on the development of plans for recruitment and retention; and

(3) serving as a liaison between the university system, tribal governments, and tribal colleges.

-End-

*** BILL NO. ***** LC0148

INTRODUCED BY **********

BY REQUEST OF THE COMMITTEE ON INDIAN AFFAIRS

A BILL FOR AN ACT ENTITLED: "AN ACT REVISING THE NEPOTISM LAW TO AUTHORIZE SCHOOL DISTRICT TRUSTEES TO APPOINT A TRUSTEE'S RELATIVE; AMENDING SECTION 2-2-302, MCA; AND PROVIDING AN IMMEDIATE EFFECTIVE DATE."

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF MONTANA:

Section 1. Section 2-2-302, MCA, is amended to read:

"2-2-302. Appointment of relative to office of trust or emolument unlawful -- exceptions -- publication of notice. (1) ~~It shall be~~ Except as provided in subsection (2), it is unlawful for any person or any member of any board, bureau, or commission or employee at the head of any department of this state or any political subdivision thereof to appoint to any position of trust or emolument any person related or connected by consanguinity within the fourth degree or by affinity within the second degree.

(2) The provisions of this section and 2-2-303 do not apply to:

(a) sheriffs in the appointment of persons as cooks ~~and/or~~ or attendants;

(b) school district trustees if at least two-thirds of the trustees approve the appointment of a person related to a trustee; and

~~(b)~~(c) the renewal of an employment contract of a person who was initially hired before the member of the board, bureau, or commission or the department head to whom he is related assumed the duties of the office.

(3) Prior to the appointment of a person referred to in subsection (2), the school district trustees shall give written notice of the time and place of their intended action. The notice must be published at least 15 days prior to the trustees' intended action in a newspaper of general circulation in the county in which the school district is located."

NEW SECTION. Section 2. **Effective date.** [This act] is effective on passage and approval.

-End-

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